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ABSTRACT

This document is one of a two-part set of publications. Both deal with equal education and provide a concise overview of Title IX and gender equity issues in education and steps to take to ensure nondiscrimination and equal education opportunity for all. Title IX of the Education Amendments of 1972 is the major federal law prohibiting sex discrimination in educational institutions receiving federal financial assistance. The regulation for Title IX, promulgated in 1975, falls into six categories: general matters related to discrimination on the basis of sex, coverage, admissions, treatment of students once they are admitted, employment, and procedures. With certain exceptions listed in Subpart B of the regulation, the law bars sex discrimination in any academic, extracurricular, research, occupational training, or other educational program (preschool to postgraduate) operated by an organization or agency that receives or benefits from federal aid. The purpose of this annotated summary is to alert educators to Title IX's requirements and to the major changes that have occurred since 1980. The annotations focus only on Title IX issues and are intended to clarify interpretation and application, and explain recent changes that have taken place. A discussion of major sex equity issues facing schools today may be found in the companion document "Beyond Title IX: Gender Equity Issues in Schools." (DK)

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An Annotated Summary of the Regulation for Title IX Education Amendments of 1972

Developed by

NOW Legal Defense and Education Fund

In Conjunction with

The Mid-Atlantic Equity Consortium, Inc.

and

The NETWORK, Inc.

U.S. DEPARTMENT OF EDUCATION
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Preface

An Annotated Summary of the Regulation for Title IX, Education Amendments of 1972 is a part of a set of publications. The companion piece is entitled *Beyond Title IX: Gender Equity Issues in Schools*. The summary of Title IX is an update of an earlier edition written and distributed by the NOW Legal Defense and Education Fund. This new version was prepared by three organizations: The NOW Legal Defense and Education Fund, The Mid-Atlantic Center of the Mid-Atlantic Equity Consortium, Inc., and The NETWORK, Inc. *Beyond Title IX: Gender Equity Issues in Schools* was prepared by the Mid-Atlantic Equity Consortium, Inc. and The NETWORK, Inc. The developers hope that these two documents provide a concise overview of Title IX and gender equity issues in education and steps to take to ensure nondiscrimination and equal education opportunity for all.

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An Annotated Summary of the Regulation for Title IX Education Amendments of 1972

Title IX of the Education Amendments of 1972 is the major federal law prohibiting sex discrimination in educational institutions receiving federal financial assistance (hereafter referred to as "covered institutions"). The law says:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.

The regulation for Title IX, promulgated in 1975, falls into six categories: general matters related to discrimination on the basis of sex, coverage, admissions, treatment of students once they are admitted, employment and procedures.[1] With certain exceptions listed in Subpart B of the regulation, the law bars sex discrimination in any academic, extracurricular, research, occupational training or other educational program (preschool to postgraduate) operated by an organization or agency which receives or benefits from federal aid.

Following publication of the implementing regulation for Title IX, there was much publicity regarding these new requirements and the responsibilities of educational institutions, programs and activities to comply. However, in the past several years, Title IX has received less attention, with many educators not even aware of its continuing existence or the changes that have taken place in its interpretation and application.

The purpose of this annotated summary is to alert educators to Title IX's requirements and to the major changes that have occurred since 1980. The annotations focus only on Title IX issues and are intended to clarify interpretation and application and/or explain recent changes that have taken place. A discussion of major sex equity issues facing schools today, i.e., those gender-related issues that go beyond the scope of the law, may be found in a companion document, *Beyond Title IX: Gender Equity Issues In Schools*.

Subpart A

Introduction — § 106.1 – 106.9

Each recipient of federal education aid must have evaluated its current policies and practices to determine whether they comply with Title IX. Each recipient must have taken whatever steps are necessary to end discrimination. Institutions must have completed the evaluations and steps to overcome the effects of bias by July 21, 1976. A description of these steps were to have been kept on file for three years after completion.

The regulation also requires that recipients adopt and publish grievance procedures to resolve complaints alleging discrimination prohibited by Title IX. Victims of discrimination are not required to use these procedures — they may file a complaint directly with the U.S. Department of Education (ED).

Recipients (for example, a school district, state education agency or university) must appoint at least one employee to coordinate its efforts to comply with Title IX.

The regulation requires recipients to notify students, parents, employees, applicants, unions and professional organizations that they do not discriminate on the basis of sex. Students and employees must be told how to contact the employee coordinating Title IX compliance efforts.

By October 21, 1975, recipients were required to issue this notice in the local press, student and alumni newspapers, and by a letter sent directly to students and employees. After that, all announcements, bulletins, catalogs and applications must contain a notice.

Although the regulation requires only an initial institutional self-evaluation to be kept on file for three years, compliance is an on-going requirement. A district in compliance in 1978 may not be in compliance now. Personnel and conditions change, and one way to spot any deviations is through regular monitoring for compliance. The requirements for a Title IX coordinator, for the adoption and publication of a grievance procedure for complaints under Title IX and notification of a policy of nondiscrimination are on-going.

Affirmative action. The Title IX regulation authorizes affirmative or remedial action in instances in which members of one sex need to be treated differently to overcome the specific effects of past discrimination. Affirmative action may be voluntary. Remedial action may be ordered by the Office for Civil Rights, U.S. Department of Education, or the courts upon a finding of such discrimination. The Supreme Court ruling in the

[1] The Title IX regulation appears at 34 CFR Part 106. The text was reprinted in the Federal Register, May 9, 1980, page 30955. Copies are available from the Office of Civil Rights, Public Affairs, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), suggested that gender classifications may be used only if they are justified by and narrowly tailored to remedy specific evidence of past discrimination.

In 1984, a Supreme Court decision, *Grove City College v. Bell*, 465 U.S. 555 (1984), limited Title IX's coverage to only those specific programs or activities receiving federal financial assistance rather than to the institution as a whole. This interpretation meant that an identical act of sex discrimination could be permissible under Title IX in one part of an educational institution while violating Title IX in another. This "program specific" interpretation was reversed by the passage of the Civil Rights Restoration Act in 1988. Title IX does indeed cover all programs and activities of an educational institution receiving federal aid, regardless of the specific purpose for which the money is received. Thus, if one program is found to be discriminatory, federal funds may be taken away from the entire institution.

Subpart B
Coverage — § 106.11 – 106.17

Exempted from the provisions of Title IX are:

- schools whose primary purpose is training for the U.S. military services or the merchant marine;
- practices in schools controlled by religious organizations whenever compliance with Title IX would be contrary to their religious beliefs;
- the membership policies of the Girl and Boy Scouts, the YMCA and the YWCA, Campfire Girls and other single-sex, tax-exempt "youth service" organizations whose members are chiefly under age 19;
- university-based social fraternities and sororities;
- activities relating to the American Legion's Boys State, Boys Nation, Girls State and Girls Nation conferences;
- father-son or mother-daughter activities, so long as opportunities for "reasonably comparable" activities are offered to students of both sexes; and
- scholarships or other aid offered by colleges and universities to participants in single-sex pageants which reward the combination of personal appearance, poise and talent.

Subpart C
Admissions and Recruitment — § 106.21 – 106.23

The regulation bars sex discrimination in admissions to certain kinds of institutions: those of vocational, professional, graduate and public coeducational undergraduate institutions. Admissions to private undergraduate institutions are exempt, including admissions to private undergraduate professional and military service schools. The exemption of the admissions practices of public and private primary and secondary schools is not designed to allow discrimination but is because, according to the legislative history, Congress had insufficient information to formulate a policy statement.

The regulation bars limitations on the number or proportion of persons of either sex who may be admitted, preferences for one sex, ranking applicants separately by sex and any other form of differential treatment by sex. The U.S. Department of Education (ED) will look at the admissions practices of each "administratively separate unit" separately.

The recipient may not use a test or other criterion for admission which adversely affects any person on the basis of sex unless the test or criterion is shown to predict successful completion of the education program and unbiased alternatives are not available. Also prohibited are rules concerning parental, family or marital status of students which make distinctions based on sex; discrimination because of pregnancy or related conditions; and asking an applicant's marital status. Recipients can ask an applicant's sex if the information is not used to discriminate.

The recipient must make comparable efforts to recruit members of each sex, except when special efforts to recruit members of one sex are needed to remedy the effects of past discrimination.

Subpart D
Treatment of Students — § 106.31 – 106.42

General Coverage — § 106.31

Although some schools are exempt from coverage with regard to admissions, all schools must treat their admitted students without discrimination on the basis of sex. Briefly, this section of the regulation covers courses and extracurricular activities (including student organizations and competitive athletics), benefits, financial aid, facilities, housing, rules and regulations and research. A student may not be limited in the enjoyment of any right, privilege, advantage or opportunity based on sex.

The regulation forbids a recipient to aid or perpetuate sex discrimination by providing "significant assistance" to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees (with some exceptions, including membership policies of social fraternities and sororities, Boy and Girl Scouts, YMCA and

YWCA). (Significant assistance may include the provision of a facility or faculty sponsor.)

In 1981, the Office for Civil Rights, ED, issued a memo stating that sexual harassment is prohibited under the provisions of Title IX. The memo included the following definition: "Sexual harassment consists of verbal or physical contact of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX." Covered institutions must have a grievance procedure in place that provides for prompt and equitable resolution of complaints of sexual harassment. This may be the same grievance procedure set up for Title IX complaints or one specially tailored for sexual harassment. The memo sets forth investigative guidelines for determining whether sexual harassment has occurred. Title IX may also cover sexual harassment of students by other students in situations in which neither student is in a position of authority, assigned by the institution.

Educators serving elementary and secondary school students should also be aware of state laws that prohibit sexual abuse by adult caretakers, including all school personnel.

Schools may not bestow awards or make selections on the basis of sex (e.g., the outstanding male student and the outstanding female student or designating three cheerleading slots for males and three for females). Criteria for selection should be established and the top candidates selected without regard to sex.

Housing and Facilities — § 106.32 and 106.33

Institutions may provide housing separately for men and women. However, housing for students of both sexes must be as a whole:

- proportionate in quantity to the number of students of that sex that apply for housing; and
- comparable in quality and cost to the student.

Institutions may not have different housing policies for students of each sex (for example, if a college allows men to live off campus, it must allow women the same option).

Toilets, locker rooms and shower facilities may be separated on the basis of sex, but these facilities must be comparable for students of both sexes.

Courses and Other Educational Activities — § 106.34 and 106.35

Courses or other educational activities may not be provided separately on the basis of sex. An institution may not require or refuse participation in any course by any of its students on that basis. This includes physical education, industrial, business, vocational, technical, home economics, music and adult education courses.

Sex education is an exception: portions of elementary and secondary school classes dealing with human sexuality may be (but do not have to be) separated by sex.

Title IX prohibits sex segregation in physical education classes except for the following:

- Students may be separated by sex within coeducational classes when participating in wrestling, boxing, rugby, ice hockey, football, basketball and other sports, the purpose or major activity of which involves bodily contact.
- Students may be grouped according to ability for instruction if the assessment is made using objective standards of individual performance which are applied without regard to sex and which do not have an adverse effect on members of one sex.
- If students' religious beliefs prohibit them from participating in coeducational physical education, they may be excused from such classes or offered sex-segregated physical education.

Choruses may be based on vocal range or quality and may result in single-sex or predominantly single-sex choruses.

Local school districts may not, on the basis of sex, exclude any person from:

- any institution of vocational education; or
- any other school or educational unit, unless the school district offers that person courses, services and facilities which are comparable to those offered in such schools, following the same policies and admission criteria.

Counseling — § 106.36

A recipient may not discriminate on the basis of sex in counseling or guiding students.

Whenever a school finds that a class has a disproportionate number of students of one sex, it must take whatever action is necessary to assure that sex bias in counseling or testing is not responsible.

A recipient may not use tests or other appraisal and counseling materials which use different materials for each sex or which permit or require different treatment for students of each sex. Exceptions can be made if different materials used for each sex cover the same occupations and are essential to eliminate sex bias.

Schools must set up their own procedures to make certain that counseling and appraisal materials are not

sex-biased. If a test does result in a substantially disproportionate number of students of one sex in a course of study or classification, the school must take action to ensure that bias in the test or its application is not causing the disproportion.

Student Financial Aid — § 106.37, 106.41 and 106.31(c)

The regulation covers all forms of financial aid to students. Generally, a recipient may not, on the basis of sex:

- provide different amounts or types of assistance, limit eligibility, apply different criteria or otherwise discriminate;
- assist through solicitation, listing, approval, provision of facilities or other services any agency, organization or person which offers sex-biased student aid; or
- employ students in a way that discriminates against one sex, or provides services to any other organization which does so.

There are exceptions for athletic scholarships and single-sex scholarships established by will or trust.

Athletic scholarships. An institution which awards athletic scholarships must provide "reasonable opportunities" for both sexes, in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. Separate athletic scholarships for each sex may be offered in connection with separate male/female teams to the extent consistent with both the section on scholarships and the section on athletics (34 C.F.R. § 106.41).

Scholarships for study abroad. The regulation exempts discriminatory student assistance for study abroad (such as Rhodes Scholarships), provided that a recipient which administers or helps to administer the scholarship awards makes available similar opportunities for the other sex (34 C.F.R. § 106.31 (c)).

Single-sex scholarships. An institution may administer or assist in the administration of scholarships and other forms of student financial aid whenever a will, trust or bequest specifies that the aid can go only to one sex, as long as the overall effect of making sex-restricted awards is not discriminatory.

To ensure this, institutions must:

- select financial aid recipients on the basis of nondiscriminatory criteria, not the availability of sex-restricted scholarships;
- allocate sex-restricted awards to students already selected in such a fashion; and
- ensure that no student is denied an award because of the lack of a sex-restricted scholarship.

Student Health and Insurance Benefits — § 106.39

Student medical, hospital, accident or life insurance benefits, services or plans may not discriminate on the basis of sex. This would not bar benefits or services which may be used by a different proportion of students of one sex than of the other, including family planning services.

Any school which provides full coverage health services must provide gynecological care.

According to a provision of the Civil Rights Restoration Act of 1988, covered institutions do not have to provide health coverage for abortions although they may do so. If they provide medical services, they are required, however, to provide treatment for conditions arising from an abortion just as they would cover any other condition requiring medical treatment. School-based health clinics operated all or in part by covered institutions must comply with this section of Title IX.

Marital or Parental Status — § 106.40

The regulation bars any rule concerning a student's actual or potential parental, family or marital status which makes distinctions based on sex.

A school may not discriminate against any student in its educational program, including any class or extracurricular activity, because of the student's pregnancy, child-birth, false pregnancy, miscarriage or termination of pregnancy, unless the student requests voluntarily to participate in a different program or activity.

If a school does offer a voluntary, separate education program for pregnant students, the instructional program must be comparable to the regular instructional program.

A school may ask a pregnant student to have her physician certify her ability to stay in the regular education program only if it requires a physician's certification for students with other physical or emotional conditions.

Recipients must treat disabilities related to pregnancy the same way as any other temporary disability in any medical or hospital benefit, service, plan or policy which they offer to students. Pregnancy must be treated as justification for a leave of absence for as long as the student's physician considers it to be medically necessary. Following this leave, the student must be reinstated to her original status.

Athletics — § 106.41

General coverage. The regulation says that no person may be subjected to discrimination based on sex in any scholastic, intercollegiate, club or intramural athletics offered by a recipient of federal education aid.

Separate teams and contact sports. Separate teams for each sex are permissible in contact sports or where selection for teams is based on competitive skill. Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and any other sport "the purpose or major activity of which involves bodily contact."

In non-contact sports, whenever a school has a team in a given sport for one sex only, and athletic opportunities for the other sex have been limited, members of both sexes must be allowed to try out for the team.

Equal opportunity. A school must provide equal athletic opportunity for both sexes. In determining whether athletic opportunities are equal, ED will consider whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. The Department will also consider (among other factors): facilities, equipment, supplies, game and practice schedules, travel and per diem allowances, coaching (including assignment and compensation of coaches), academic tutoring, housing, dining facilities and publicity.

Equal expenditures are not required, but ED "may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."

In 1979, the Office for Civil Rights provided additional guidelines for provision of equal opportunity in athletics. If covered institutions provide a team for members of one sex in a given sport (either contact and non-contact sports), they must provide a team for members of the opposite sex (1) if opportunities for the excluded sex have been limited and (2) there is adequate interest and ability among members of the excluded sex to sustain a competitive team and there is reasonable expectation of opportunities for that team to compete. For non-contact sports, persons interested in establishing a team must also show that members of the excluded sex are not sufficiently skilled to be selected for a coed team or to compete on that team if selected.

Textbooks — § 106.42

The regulation does not require or abridge the use of particular textbooks or curriculum materials, which were excluded from Title IX coverage because of possible conflict with First Amendment rights. However, institutions are encouraged to review their instructional materials to ensure that the history, role, impact and perspectives of members of both sexes are included and presented without bias or stereotyping.

Subpart E
Employment — § 106.51 - 106.61

In *North Haven v. Bell*, 456 U.S. 512 (1982), the Supreme Court affirmed that Title IX does protect employees from sex discrimination. In so doing, the court held that the ED has broad authority in issuing regulations to enforce Title IX. Thus, Title IX joins Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and Executive Order 11246 in prohibiting sex discrimination in covered institutions. Because Title IX is the newest of these nondiscrimination statutes and because of its checkered history of coverage, the bulk of the applicable case law arises under Title VII and the Equal Pay Act.

General Provisions — § 106.51 - 106.55

All employees, both full-time and part-time, in all institutions are covered except those in military schools and those in religious schools to the extent compliance would be inconsistent with the controlling religious tenets.

In general, the regulation prohibits: discrimination based on sex in employment, recruitment and hiring, whether full-time or part-time, under any education program or activity which receives or benefits from federal financial aid. It also bars an institution from entering into union, employment agency or fringe benefit agreements which subject individuals to discrimination.

An institution may not limit, segregate or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

The regulation prohibits sex discrimination in all aspects of employment, including employment criteria, advertising and recruitment, hiring and firing, promotion, tenure, pay, job assignments, training, leave and fringe benefits.

If the institution is found to have practiced sex discrimination in recruitment or hiring, however, it must recruit members of the sex against which it has discriminated to overcome the effects of past discrimination.

Fringe Benefits — § 106.56

An institution is prohibited from discriminating on the basis of sex in providing fringe benefits to employ-

ees or their spouses, families or dependents. Examples of fringe benefits include health, dental, and life insurance, leave, retirement or other employment benefits.

Fringe benefits plans must provide either for equal periodic benefits for male and female employees or equal contributions for both sexes. Retirement plans may not establish different retirement ages for employees of each sex.

Marital Status and Pregnancy — § 106.57

An institution may not apply any employment policy concerning the potential marital, parental or family status of an employee or employment applicant which makes distinctions based on sex.

In addition, it may not have policies based on whether the employee or applicant is head of household or principal wage earner in the family.

An institution may not discriminate in employment on the basis of pregnancy or related conditions. A temporary disability resulting from these conditions must be treated as any other temporary disability for all job-related purposes, including leave, seniority, reinstatement and fringe benefits. If the employer has no temporary disability policy, pregnancy and related conditions must be considered a justification for leave without pay for a "reasonable" time period and the employee reinstated to her original or comparable status when she returns from leave.

For a more complete explanation of the nondiscrimination requirements affecting marital and parental status, see the Pregnancy Discrimination Act passed by Congress in 1978. Also, according to the Civil Rights Restoration Act, covered institutions do not have to provide health coverage for abortions although they may choose to do so. They are, however, required to cover treatment for conditions arising from abortions and may not discriminate against any employee who has received or is seeking an abortion.

Effect of State and Local Laws — § 106.58

The obligation to comply with the Title IX regulation is not precluded by any state or local laws.

Subpart F
Enforcement Process — § 106.71

In enforcing Title IX, the U.S. Department of Education will follow the procedures of Title VI of the Civil Rights Act of 1964. Under these procedures, ED must investigate promptly complaints submitted by individuals or groups. Letters charging that discrimination has occurred may be sent to the Assistant Secretary for Civil Rights, U.S. Department of Education, 330 C Street, SW, Washington, D.C. 20202 or to the Director of the Regional Office for Civil Rights responsible for enforcement in that state. ED also conducts compliance reviews — broad-based investigations of school districts or universities initiated by ED.

Complaints must be filed within 180 days of the alleged discrimination. The victim may file herself/himself, or someone else may file in his/her behalf. Retaliation for filing a complaint is prohibited under Title IX.

If, after an investigation, ED finds that discrimination exists, it must try to achieve voluntary compliance by the institution. Failing this, ED may then conduct administrative hearings which could lead to termination of federal financial assistance.

ED can also refer the matter to the Department of Justice for possible federal prosecution or to state or local authorities for action under state or local laws.

As an alternative to pursuing administrative remedies, individuals may file a Title IX claim directly in court if they choose to do so. The full text of these procedures appears at 34 CFR § 100.6 – 100.11 and 34 CFR Part 101.

In 1992 the Supreme Court of the United States, in *Franklin v. Gwinnett County Public Schools*, 117 L.Ed.2d 208 (1992), ruled that a plaintiff bringing suit under Title IX may request a damages remedy. No cap on damages is specified. This ruling is partly in contrast to the Civil Rights Act of 1991 which allows plaintiffs to sue for damages under Title VII (Civil Rights Act of 1964) in cases of intentional discrimination on the basis of sex but places a cap on the damages allowed based on the size of the employer.

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